SAMBU (M) SDN. BHD.

v.

STONE WORLD SDN. BHD. & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-284-1995]
26 NOVEMBER 1996

CIVIL PROCEDURE: *Order 18 r. 19(1)(a), (b), (c) and (d) - Striking out pleadings - Whether could be used cumulatively - Invocation of O. 18 r. 19(1)(a) - Whether meant that no evidence should be admissible - Rules of the High Court 1980 O. 18 rr. 19(1)(a), (b), (c) & (d), 19(2).*

By encl. 49 herein the second defendant applied to strike out the writ and statement of claim of the plaintiffs by invoking cumulatively O. 18 r. 19(1)(a), (b), (c) and (d) Rules of the High Court 1980 (RHC). In the same enclosure, to further support the application, the second defendant also made it clear that they intended to use affidavit evidence, i.e. the affidavit of one Chang Fok Chin. Following preliminary objection by the plaintiff, the learned Senior Assistant Registrar ('SAR') ruled that O. 18 r. 19(1)(a), (b), (c) and (d) of the RHC could not be invoked cumulatively, and secondly that, having invoked O. 18 r. 19(1)(a), it was not open for the second defendant to admit of any evidence. Enclosure 49, in the event, was struck out with liberty to file afresh. The second defendant has since appealed to the Judge-in-Chambers.

Held:

[1] The SAR was right when he allowed the preliminary objection and struck out encl. 49 with liberty to file afresh.

[2] It is settled law that where the only ground on which the application for striking out pleadings is based on allegation that the statement of claim discloses no reasonable cause of action, i.e. based on O. 18 r. 19(1)(a) of the RHC, no evidence shall be admissible and the Court must only consider the pleadings. However, where such applications were grounded on (b) or (c) or (d) of the said O. 18 r. 19(1), or for that matter where the inherent jurisdiction of the Court is invoked as stated in encl. 49 herein, affidavit evidence may and will ordinarily be used.

[3] The word 'or' that appears between (a), (b), (c) and (d) of O. 18 r. 19(1) of the RHC is disjunctive in its effect. The second defendant, when resorting to O. 18 r. 19(1) must therefore be very specific, and must not cumulatively add (a), (b), (c) and (d) together and lump them as one. This aside, to do so would also run counter to the explicit provisions of r. 19(2) of O. 18 of the RHC.

[Appeal dismissed.]

Cases referred to:

Attorney-General of Duchy of Lancaster v. L. & N.W. Ry [1892] 3 Ch. 278 ***(refd)***
Republic of Peru v. Peruvian Guano Co. [1887] 36 Ch. D 489 ***(refd)***
Wenlock v. Moloney [1965] 1 WLR 1238; [1965] 2 All ER 871 CA ***(foll)***
Willis v. Earl Howe [1893] 2 Ch. 551 ***(refd)***
Vinson v. The Prior Fibres Consolidated Ltd. [1906] WN 209 ***(refd)***
Norman v. Matthews [1916] 85 LJ KB 857 ***(refd)***
Norman v. Matthews [1916] WN 133 ***(refd)***
Remmington v. Scoles [1897] 2 Ch. 1 ***(refd)***
Uddin v. Associated Portland Cement Manufacturers Ltd. [1965] 2 QB 582 ***(refd)***
R. v. Surrey Quarter Sessions, ex parte Commissioner of Metropolitan Police [1963] 1 QB 990 ***(refd)***
Chung Khiaw Bank Ltd. v. Tio Chee Hing [1987] 2 MLJ 701 ***(refd)***
Jamir Hassan v. Kang Min [1991] 3 CLJ 2490 ***(refd)***
Roslan bin Abdullah v. New Zealand Insurance Co. Ltd. [1981] 2 MLJ 324 FC ***(refd)***
Jurupakat Sdn. Bhd. v. Kumpulan Good Earth (1973) Sdn. Bhd. [1988] 3 MLJ 49 ***(foll)***
Supputetchimi v. Palmco Bina Sdn. Bhd. [1994] 2 MLJ 368 ***(not foll)***
All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No: 26977 for Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn. Bhd. [1995] 4 BLJ 337 **(cit)**
New Straits Times (Malaysia) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor. [1985] 1 MLJ 226 FC ***(foll)***
Hashim bin Din v. Sato Kogyo Co. Ltd. [1988] 1 MLJ 527 ***(foll)***
Paul Law Ung Hua & Anor. v. Hong Wei Organisation Sdn. Bhd. [1996] 4 MLJ 489 ***(foll)***
Perbadanan Nasional Insurans Sdn. Bhd. (dahulunya dikenali sebagai Union Insurance Malaysia Sdn. Bhd.) v. Pua Lai Ong [1996] 3 CLJ 321 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d), 19(2), 19(3), O. 32 r. 13(2)(b)

For the plaintiff - Jagjit Singh; M/s. Jagjit Singh & Co.
For the 2nd defendant - Lee Ting Kiat; M/s. Andrew Wong & Co.

JUDGMENT

Abdul Malik Ishak J:

On 14 September 1996 the Senior Assistant Registrar ('SAR') agreed with the preliminary objection advanced by the plaintiff and struck out encl. 49 with liberty to file afresh. On the same date, the SAR refused to accede to the preliminary objection of the second defendant as they were not relevant then. Being aggrieved the second defendant filed an appeal to the Judge in chambers dated 16 September 1996 as reflected in encl. 54.

Enclosure 49 was an application by the second defendant to strike out the writ and the statement of claim of the plaintiff using cumulatively O. 18 r. 19(1)(a), (b), (c) and/or (d) of the Rules of the High Court 1980 ('RHC'). This provoked the displeasure of the plaintiff who then raised a preliminary objection to the following effect. That O. 18 r. 19(1)(a), (b), (c) and/or (d) of the RHC cannot be invoked cumulatively. That reliance under O. 18 r. 19(1)(a) of the RHC must necessarily mean that no evidence shall be admissible and the Court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action. For ease of reference O. 18 r. 19 of the RHC is now reproduced hereinunder:

> 19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:
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> (a) it discloses no reasonable cause of action or defence, as the case may be; or
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> (b) it is scandalous, frivolous or vexatious; or
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the Court.

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

> (2) No evidence shall be admissible on an application under para. (1)(a).
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> (3) This rule shall, so far as possible, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

The second defendant announced to the whole world at large, so to speak, in encl. 49 of their intention to use the affidavit of Chang Fok Chin that was affirmed on 30 May 1996 even though they sought to strike out the statement of claim as it disclosed no reasonable cause of action under O. 18 r. 19(1)(a) of the RHC. Can the second defendant do so? It is now settled law that where the only ground on which the application for striking out is made is pivoted on the point that the statement of claim discloses no reasonable cause of action, no evidence is admissible: *Attorney-General of Duchy of Lancaster v. L. & N.W. Ry* [1892] 3 Ch. 278; *Republic of Peru v. Peruvian Guano Co.* [1887] 36 Ch. D. 489, p. 498. It is interesting to note that *Wenlock v. Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 CA lays down the now famous principle that where the only ground on which the statement of claim can be said to disclose no reasonable cause of action relates to the point that the action is unlikely to succeed, affidavit evidence is said to be equally inadmissible. My understanding of *Wenlock v. Moloney (supra)* when

translated to the issue at hand is this: applications for striking out pleadings on grounds (b) or (c) or (d) of O. 18 r. 19(1) of the RHC or for that matter as stated in encl. 49 where the inherent jurisdiction of the Court is invoked, affidavit evidence may and will ordinarily be used. All the facts will be considered and the affidavits as to the facts of the whole case would also be admissible where the application is grounded on the inherent jurisdiction of the Court: *Willis v. Earl Howe* [1893] 2 Ch. pp. 551, 554; *Vinson v. The Prior Fibres Consolidated Ltd.* [1906] WN 209; *Norman v. Matthews* [1916] 85 LJ KB 857 and on appeal it was reported in [1916] WN 133; *Remmington v. Scoles* [1897] 2 Ch. 1.

The word 'or' appears between (a), (b), (c) and (d) of O. 18 r. 19(1) of the RHC and in ordinary usage the word 'or' is said to be disjunctive (*Uddin v. Associated Portland Cement Manufacturers Ltd.* [1965] 2 QB 582; *R. v. Surrey Quarter Sessions, ex parte Commissioner of Metropolitan Police* [1963] 1 QB 990). In my judgment, the second defendant when resorting to O. 18 r. 19(1) of the RHC must be very specific and must not cumulatively add (a), (b), (c), (d) together and lump them as one as it would run counter to the explicit provisions of r. 19(2) of O. 18 of the RHC.

In *Chung Khiaw Bank Ltd. v. Tio Chee Hing* [1987] 2 MLJ 701, Wan Suleiman SCJ (as he then was) speaking for the then Supreme Court was quite happy with the format adopted in applying for the striking out of the writ and the statement of claim under O. 18 r. 19 of the RHC in that it either disclosed no reasonable cause of action or alternatively that it was vexatious and an abuse of the process of the Court. With respect, the then Supreme Court in that case was not faced with the pivotal issue as is faced by this Court, namely: whether in an application for striking out the writ and the statement of claim under O. 18 r. 19(1)(a) of the RHC, the affidavit evidence should be considered by the Court? The same is also true in the case of *Jamir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1992] 2 MLJ 46. So too would be the case of *Roslan bin Abdullah v. New Zealand Insurance Co. Ltd.* [1981] 2 MLJ 324 FC.

Zakaria Yatim J (now FCJ) in *Jurupakat Sdn. Bhd. v. Kumpulan Good Earth (1973) Sdn. Bhd.* [1988] 3 MLJ 49 was of the view, and rightly so, that under O. 18 r. 19(1)(a) of the RHC, affidavit evidence was inadmissible. The controversial case of *Suppuletchimi v. Palmco Bina Sdn. Bhd.* [1994] 2 CLJ 561; [1994] 2 MLJ 368 was decided by Vincent Ng J where his Lordship was of the view that in an application under O. 18 r. 19(1)(a) of the RHC, the requirement under O. 18 r. 19(2) of the RHC that an averment in an affidavit should be disregarded, was said to be not of absolute application as the Court would still be entitled, in its inherent jurisdiction, to look at and decide upon the contents of the affidavit to see whether the claim disclosed a

reasonable cause of action or defence. With respect Vincent Ng J has gone against the grain of the concept of *stare decisis.* The law on the issue at hand is settled. It cannot be reagitated at the High Court level. On *stare decisis,* I did say in *All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No: 26977 for Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn. Bhd.* [1995] 4 BLJ 337; [1996] 4 MLJ 533 that:

> The use of precedent is an indispensable tool in a Court of law. It is an indispensable foundation upon which the Judge is to decide what is the law and what is its application to individual cases. The only thing that I can see in a Judge's decision binding as an authority is the principle upon which the case was decided (see *Osborne v. Rowlett* [1880] 13 Ch. D. 774 at p. 785). In my considered view, judicial authority belongs not to the exact words used nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision (see *Close v. Steel Co. of Wales Ltd*. [1962] AC 367; [1962] 2 All ER 953 (HL)). Thus, the enunciation of the reason or principle upon which a question before the Court has been decided is said to be binding as a precedent. What constitutes binding precedent is the *ratio decidendi* and this is ascertainable by an analysis of the material facts of the case. It is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the *ratio decidendi* of the case (see *Monk v. Warbey* [1935] 1 KB 75 at p. 78 (HL)). It is germane to mention that mere passing remarks of a Judge are known as *'obiter dicta'*, whilst considered enunciations of the Judge's opinion on a point not arising for decision, and so not part of the *ratio decidendi*, have been termed as 'judicial *dicta*' (see *Richard West & Partners (Inverness) Ltd. v. Dick* [1969] 2 Ch. 424 at p. 413; [1969] 1 All ER 289 at 292).

Way back in 1985, the old Federal Court had occasion to consider the latitude and scope of O. 18 r. 19(1)(a) of the RHC in the case of *New Straits Times (Malaysia) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor*. [1985] 1 MLJ 226 FC where Mohamed Azmi FJ (now FCJ of the present Federal Court) after referring to *Attorney-General of Duchy of Lancaster v. L. & N.W. Ry (supra)* in serious vein said:

> If is therefore clear law that in an application to strike out pleadings under O. 18 r. 19(1)(a), no evidence shall be admissible, and the Court must only consider the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the statement of defence disclosed no defence. The test to be applied is whether on the face of the pleading, the Court is prepared to say that the cause of action or the defence is obviously unsustainable.

Lim Beng Choon J (as he then was) did not consider the decision of Mohamed Azmi FJ (now FCJ of the present Federal Court) in *New Straits Times (Malaysia) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor. (supra)* but all the same his Lordship arrived at the same conclusion in regard to the

scope of O. 18 r. 19(1)(a) of the RHC when he delivered the decision of *Hashim bin Din v. Sato Kogyo Co. Ltd.* [1988] 1 MLJ 527. This was what Lim Beng Choon J (as he then was) said in that case:

> It is also to be noted that in striking off the writ or pleadings on the ground that there is no reasonable cause of action, no affidavit evidence is admissible in support of the application and the Court must only scrutinise the following documents: the writ and the pleadings of the parties. See *Rediffusion (Hong Kong) Ltd's* case [1970] AC 1136 at p. 1159F. The scope of this proposition is also well exemplified in *Wenlock v. Moloney* [1965] 2 All ER 871 where it is stated at p. 873 as follows:
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> > It is said before this Court (and no doubt was said before the master) that the affidavits were put in not under (a) but under (b) and (d) of r. 19(1). If, as here, the only ground on which the action can be said to disclose no reasonable cause of action is that it is not one which is likely to succeed then I doubt whether the affidavit is admissible. There have been cases where affidavits have been used to show that an action was vexatious or an abuse of the process of the Court but not, as far as we have been informed, or as I know, where it has involved the trial of the whole action where facts and issues had been raised and were in dispute. To try the issue in this way is to usurp the function of the trial Judge.

At the next page in the same judgment, Lim Beng Choon J (as he then was) continued:

> A similar approach was adopted by our High Court in *Mooney & Ors. v. Peat, Marwick, Mitchell & Co. & Anor.* [1967] 1 MLJ 87. In that case the question before the Court was whether the statement of claim ought to be struck out under O. 25 r. 4 of the old Rules of the Supreme Court as disclosing no reasonable cause of action. In dismissing the application, Raja Azlan Shah J (as His Highness then was) stated at p. 88:
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> > It is firmly established that the power exercisable under r. 4 "is only appropriate in cases which are plain and obvious so that a Judge can say at once that a statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to the relief of which he asks for": (see the judgment of Lindley MR *in Hubbuck & Sons v. Wilkinson, Heywood & Clark Ltd.* [1899] 1 QB 86, 91). Where the situation arises, the pleadings and particulars alone shall be considered and all the allegations in it shall be presumed to be true, and is only on that assumption that any statable case can be made for this application: (see *Peck v. Russell* [1923] 4 FMSLR 32, 34). The Court cannot and indeed is not empowered to look behind the pleadings and particulars if it discloses a reasonable cause of action. So long as the statement of claim discloses some ground of action the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out (see *Boaler v. Holder* [1886] 54 LT 298). A recent exposition of the law is afforded by the judgment of Danckwerts LJ in *Wenlock v. Moloney* [1965] 1 WLR 1238, 1243).

Recently Abdul Kadir Sulaiman J in *Paul Law Ung Hua & Anor. v. Hong Wei Organisation Sdn. Bhd.* [1996] 4 MLJ 489 reviewed a list of authorities and arrived at the same conclusions as Mohamed Azmi FJ (now FCJ in the present Federal Court) in the case of *New Straits Times (supra)* particularly on the scope and ambit of O. 18 r. 19(1)(a) of the RHC.

Based on the authorities discussed above, the SAR was right when he agreed with the preliminary objection of the plaintiff and struck out encl. 49 with liberty given to the second defendant to file afresh.

The preliminary objection of the second defendant advanced before the SAR and before me went like this. The affidavit-in-reply of Kim Won Joon affirmed on 3 August 1996 in encl. 48a in rebuttal to the affidavit of Chang Fok Chin that was affirmed on 30 May 1996 was filed out of time and, consequently, it did not comply with the provisions of O. 32 r. 13(2)(b) of the RHC. At great length Siti Norma Yaakob JCA in *Perbadanan Nasional Insurans Sdn. Bhd. (dahulunya dikenali sebagai Union Insurance Malaysia Sdn. Bhd. v. Pua Lai Ong* [1996] CLJ JT (21); [1996] 3 CLJ 321 went through the rigmarole, rather painstakingly, to discuss the provisions of O. 32 r. 13(2)(b) of the RHC and she ruled that it was mandatory for an affidavit-in-reply to be filed and served within the 14 days from the time the affidavit that it sought to reply was received. I am bound and wholeheartedly agree with what Siti Norma Yaakob JCA said in that case but, at the same time, I would also agree with the SAR that it was premature to raise this point as encl. 49 had been struck out for non-compliance with O. 18 r. 19(2) of the RHC. Without encl. 49 there was thus no affidavit of Chang Fok Chin to reckon with and, consequently, there was no need for this Court to consider the affidavit-in-reply of Kim Won Joon. It was for this reason that the preliminary objection of the second defendant was not acceded to by me.

This case demonstrates, once again, the agility of Counsel to manoeuvre through the RHC in order to obtain the desired result. Interlocutory applications are varied and manifold in our Courts. These interlocutory applications, though at times stifling, yet they are necessary evils. They serve to warn the opposing party of the need to be vigilant and not caught off guard. They serve as an intellectual outlet for the agile and the robust. The converse would be true. Those caught off guard would pay dearly for their folly. For the Courts, these interlocutory applications would continue to play dominant roles for a long time to come. Indeed interlocutory applications are invariably necessary in order to deal with the rights of the parties in the interim period between the commencement of the proceedings and their final determination. These interlocutory applications would move the Courts to grant such interim reliefs or remedies as may be just or convenient. These reliefs or remedies are

designed to achieve one or more of several objectives, for instance, to maintain the *status quo ante*, to prevent hardship or prejudice to one or other of the parties, to preserve a fair equilibrium between the parties and at the same time to give them due protection while awaiting the final outcome of the proceedings, and last but by no means least, to prevent any abuse of process during the interim period. Be that as it may, for the reasons adumbrated above, I had no choice but to dismiss encl. 54 with costs. I gave liberty to the second defendant to file afresh encl. 49.

Reported by W.A Shariff